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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. FRANCISCO CARRETO, Defendant and Appellant.	2d Crim. No. B286991 (Super. Ct. No. 2005032664) (Ventura County)

Francisco Carreto appeals an order denying his motion to vacate his 2006 conviction for unlawful transportation of a controlled substance – methamphetamine (Health & Saf. Code, § 11379, subd. (a)), a felony. Carreto claimed he was not properly advised of and did not understand the immigration consequences of his guilty plea. He filed his motion to vacate in 2017 relying on Penal Code section 1473.7.[1] We affirm.

[1] All statutory references are to the Penal Code unless otherwise stated.

FACTS

On September 19, 2005, a police officer detained Carreto for being "under the influence of a controlled substance." In a search of his person, police found a "large plastic bag" of methamphetamine and more than $7,000 in cash. The People charged Carreto with possession for sale of a controlled substance (Health & Saf. Code, § 11378), transportation of a controlled substance (*id.*, § 11379, subd. (a)), and being under the influence of a controlled substance (*id.*, § 11550, subd. (a)).

In 2006, Carreto pled guilty to transportation of a controlled substance and initialed an immigration advisement on the plea agreement form. It provided: "If I am not a citizen, I could be deported, excluded from the United States or denied naturalization. (Pen. Code § 1016.5.) If I am not a citizen and am pleading guilty to an aggravated felony, conspiracy, a controlled substance offense, a firearm offense, or under certain circumstances a moral turpitude offense, *I will be deported*, excluded from the United States and denied naturalization. (8 U.S.C. §§ 1101(a)(43), 1182, 1227.)" (Italics added.)

On July 7, 2017, Carreto filed an emergency motion to vacate the 2006 conviction pursuant to section 1385. He claimed he was not properly advised about the immigration consequences when he pled guilty in 2006 and he was now subject to deportation. The trial court denied the motion. It ruled it lacked "the power" to grant relief because the motion was brought under section 1385 which did not apply to his immigration advisement challenge.

On August 14, 2017, Carreto filed a motion to vacate the 2006 guilty plea relying on section 1473.7 – a statute authorizing challenges to guilty pleas where the defendant did not

"meaningfully understand" the immigration consequences. In his declaration Carreto stated, "When the plea bargain in this case was presented to me, no one told me that this guilty plea would make my deportation mandatory under immigration law – my defense counsel did not tell me that, the prosecutor did not tell me that, and the judge did not tell me that. [¶] . . . If my defense attorney had told me that this guilty plea made my deportation mandatory under immigration law, I would never have pleaded guilty."

At the hearing on the motion, Carreto did not testify and his counsel called no witnesses. His notice of motion did not request an evidentiary hearing. Instead, he relied on his declaration to supply the facts supporting his motion and his counsel made an oral argument.

The trial court denied the motion. It said Carreto failed to bring the motion with due diligence. Carreto was notified by the Immigration and Customs Enforcement (ICE) on September 22, 2015, that immigration "removal proceedings had been initiated against him." It also found his declaration was impeached "by the express terms of the plea form he initialed and signed," and it was not supported by corroborating evidence. The declaration was "conclusory" and "lacks credibility." The court said that Carreto had not shown ineffective assistance and that he was properly advised of the immigration consequences.

DISCUSSION

Understanding the Immigration Consequences of the Guilty Plea

Carreto contends the order denying his section 1473.7 motion to vacate his plea must be reversed because "the evidence shows that he did not 'meaningfully understand' the immigration consequences of his guilty plea." (Boldface omitted.)

"Section 1473.7 provides: 'A person no longer imprisoned or restrained may prosecute a motion to vacate a conviction or sentence' for one of two reasons, including that '[t]he conviction or sentence is legally invalid due to a prejudicial error damaging the moving party's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a plea of guilty or nolo contendere.'" (*People v. Perez* (2018) 19 Cal.App.5th 818, 824.) The defendant has the burden to prove that he or she "did not meaningfully understand the immigration consequences" to prevail on this motion. (*Id.* at p. 829.) Upon such proof, "the court must allow the person to withdraw his or her plea." (*Id.* at p. 824.)

Reasonable Diligence

The People contend Carreto's motion to vacate his plea was properly denied because he did not proceed with reasonable diligence.

The trial court found immigration removal proceedings were "initiated against" Carreto on September 22, 2015. It said Carreto should have filed his motion to vacate his plea at that time. But Carreto filed a motion under section 1473.7, which did not become law until January 2017. (*People v. Perez*, *supra*, 19 Cal.App.5th at p. 829.) The People claim Carreto "waited more than seven months from section 1473.7's effective date to bring his motion."

The immigration removal petition listed three of Carreto's convictions and set forth more than one ground for removal. Carreto's hearing on that petition was scheduled for November 1, 2016, but the immigration judge continued it to April 11, 2017. Carreto's counsel filed a declaration in the trial court stating Carreto was notified by the immigration judge on April 11, 2017,

that he was entitled to "terminate [immigration] removal proceedings," but the obstacle to that relief was his 2006 guilty plea.

Carreto claims he acted diligently because he did not learn until April 11, 2017, that his 2006 conviction was the ground the federal authorities selected as the ground for removal. On July 7, 2017, he filed his first "emergency motion to vacate" his conviction. (§ 1385.) On August 14, 2017, he filed the instant motion under section 1473.7.

Section 1473.7 subdivision (b), applicable at the time of the trial court's decision, provided, in relevant part, "A motion . . . shall be filed with reasonable diligence *after the later* of the following: [¶] (1) The date the moving party receives a notice to appear in immigration court *or other notice from* immigration authorities that asserts the conviction or sentence as a basis for removal. [¶] (2) The date a removal order against the moving party, based on the existence of the conviction or sentence, *becomes final*." (Italics added.) This statute broadly extends the time for bringing motions to vacate. The People have not shown there was a final removal order or that Carreto failed to proceed with due diligence under section 1473.7, subdivision (b)(2). (*People v. Perez*, *supra*, 19 Cal.App.5th at p. 829 [the trial court's "untimeliness analysis" must be based on the terms of this statute].)

The Merits

We review the order denying Carreto's motion to vacate under the abuse of discretion standard. (*People v. Perez*, *supra*, 19 Cal.App.5th at p. 828.)

Prior to accepting a guilty plea, the defendant must be advised of the immigration consequences as required by section

1016.5. That advisement provides, "'If you are not a citizen, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.'" (*People v. Perez*, *supra*, 19 Cal.App.5th at p. 825, fn. 5.)

The trial court found Carreto was properly advised of the immigration consequences of his plea. It noted that the plea agreement Carreto signed contains the advisement required by section 1016.5. (*People v. Perez*, *supra*, 19 Cal.App.5th at p. 825, fn. 5.)

Carreto claimed that advisement was insufficient. In support of his motion to vacate, he filed a declaration stating, "When the plea bargain in this case was presented to me, no one told me that this guilty plea would make my deportation *mandatory* under immigration law . . . ." (Italics added.)

But in pleading guilty, Carreto signed a felony disposition statement and initialed the following advisement: "If I am *not a citizen* and am pleading guilty to an aggravated felony, conspiracy, *a controlled substance offense*, . . . *I WILL BE DEPORTED*, excluded from the United States and denied naturalization." (Italics and capitalization added.)

The statement "I will be deported" shows deportation is mandatory. "The admonition was . . . unequivocal and accurate." (*People v. Olvera* (2018) 24 Cal.App.5th 1112, 1117.) Pleading guilty to "an aggravated felony under federal immigration law[] . . . triggers mandatory removal." (8 U.S.C. § 1101(a)(43)(B), (U).)" (*Id.* at p. 1115.)

The trial court found Carreto's declaration was impeached by this advisement. It said his claim about not being advised of

the mandatory immigration consequences was not credible. We do not decide credibility. That is a matter decided by the trial court. (*People v. Maury* (2003) 30 Cal.4th 342, 403; *In re Daniel G.* (2004) 120 Cal.App.4th 824, 830; *People v. Quesada* (1991) 230 Cal.App.3d 525, 533 [on a motion to set aside a plea, the trial court "is the trier of fact and hence the judge of the credibility of the witnesses or affiants"].) But "[w]e independently review the order denying the motion to vacate which 'presents a mixed question of fact and law.'" (*People v. Olvera*, *supra*, 24 Cal.App.5th at p. 1116.)

Carreto's declaration is short and conclusory. It does not contain many details or facts. Carreto did not state facts about the immigration advisement he initialed that provided, "I will be deported." The trial court could reasonably draw negative inferences against him because of this and for his failure to testify to support his motion and answer questions about this provision. (Evid. Code, §§ 412, 413.)

Carreto also declared, "If my defense attorney had told me that this guilty plea made my deportation mandatory under immigration law, I would never have pleaded guilty." To establish ineffective assistance of counsel, the defendant must show counsel's performance was both deficient and prejudicial. (*Strickland v. Washington* (1984) 466 U.S. 668, 688, 694.) "[I]neffective assistance claims may be viable despite the collateral nature of immigration consequences and despite statutory warnings that the plea 'may' have such consequences." (*People v. Olvera*, *supra*, 24 Cal.App.5th at p. 1116.)

But such claims in "self-serving" declarations to vacate pleas "must be corroborated independently by objective evidence." (*In re Alvernaz* (1992) 2 Cal.4th 924, 938.) A defendant's "self-

serving statement . . . is insufficient in and of itself to sustain the defendant's burden of proof." (*Ibid.*) The trial court found Carreto did not produce corroborating or supporting evidence. No witnesses were called to testify at the hearing. The court said Carreto did "not present any declaration of the attorney who represented him at the time of his plea."

That omission is significant. The attorney who represented Carreto at the time of his plea signed a statement attached to the plea agreement. He said he "explained the direct and indirect consequences of this plea to [Carreto]" and he was "satisfied [Carreto] understands them." On the plea form Carreto confirmed that his "attorney has explained to [him] the direct and indirect consequences of this plea."

Carreto now questions the significance of the immigration consequences advisement he initialed. But the trial court properly considered "the record that is contemporaneous to [Carreto's] guilty plea." (*People v. Perez*, *supra*, 19 Cal.App.5th at p. 830.) When Carreto entered his plea at the 2006 hearing, he told the court that he placed his "initials" on the plea form "after going over those items on the form with [his] attorney." He said he had no "questions whatsoever about anything on this form" and his attorney explained the "direct and indirect consequences of this plea . . . ." This, coupled with the express language of the immigration advisement, supports the finding that Carreto's counsel "satisfied" his duty to advise him of the immigration consequences. (*People v. Olvera, supra*, 24 Cal.App.5th at p. 1117.)

Carreto claims his case is analogous to *Lee v. United States* (2017) __U.S.__ [137 S.Ct. 1958, 198 L.Ed.2d 476]. We disagree.

In *Lee*, the court found a defendant's counsel provided incorrect immigration advice constituting ineffective assistance. Lee presented uncontradicted evidence at the hearing on his motion to set aside his plea. Lee and his counsel testified. His counsel admitted ineffective assistance by incorrectly advising Lee that he would not face deportation as a result of his guilty plea.

Here, by contrast, Carreto presented no evidence at the hearing. He relied solely on his own declaration. But the trial court found the declaration was not credible, a finding that undermined the factual basis for Carreto's motion. The court acted within its discretion in making that finding given: 1) the conflict between Carreto's declaration and the plea agreement's immigration advisement, 2) Carreto's and his counsel's statements on the plea form, and 3) Carreto's statements at the 2006 hearing.

"Courts should not upset a plea solely because of *post hoc* assertions from a defendant about how he would have pleaded but for his attorney's deficiencies. Judges should instead look to contemporaneous evidence to substantiate a defendant's expressed preferences." (*Lee v. United States*, *supra*, __ U.S. __ [137 S.Ct. 1958, 1967, 198 L.Ed.2d 476, 487].) Here the trial court looked to the contemporaneous record and properly found no ineffective assistance.

DISPOSITION

The order is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

PERREN, J. TANGEMAN, J.

Matthew P. Guasco, Judge

Superior Court County of Ventura

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